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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 534

BOURJOIS, INC.,

Appellant,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER AND GEORGE H. COOMBS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

STATEMENT AS TO JURISDICTION.

HARRY M. VERRILL,
ROBERT HALE,
CHARLES D. BOOTH,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	2
Statute of the State, the validity of which is involved	2
Date of the decree sought to be reviewed and date of application for appeal	6
Nature of the case and statement of the grounds upon which it is contended that substantial questions are involved	6
Cases believed to sustain jurisdiction	8
Exhibit "A"—Opinion of U. S. District Court on denial of temporary injunction	9
Exhibit "B"—Opinion of U. S. District Court on final hearing	13

Table of Cases Cited.

A. L. A. Schechter Poultry Corporation v. *United States*, 295 U. S. 495	8
Atlantic Refining Co. v. *Trumbull*, 43 F. (2d) 154	8
Brucker v. *Fisher*, 49 F. (2d) 759	8
Cape Elizabeth v. *Boyd*, 86 Me. 317	8
Central Railway Co. v. *Wright*, 207 U. S. 127	8
Chicago R. R. Co. v. *State of Minnesota*, 134 U. S. 418	8
Cleveland Refining Co. v. *Phipps*, 277 Fed. 463, 261 U. S. 449	8
Dunn v. *Burleigh*, 62 Me. 24	8
George H. Lee Co. v. *Webster*, 190 Fed. 353	8
Interstate Busses Corporation v. *Blodgett*, 276 U. S. 230	8
Jackson v. *Cravens*, 238 Fed. 117	8
Lugo v. *Suazo*, 59 F. (2d) 386	8
Noel v. *The People*, 187 Ill. 587	8
Oklahoma Gas & Electric Co. v. *Oklahoma Co.*, 292 U. S. 386	8

Page

Pacific Telephone Co. v. *Kuykendall*, 265 U. S. 196 8
Panama Refining Co. v. *Ryan*, 293 U. S. 388 8
Randall v. *Patch*, 118 Me. 303 8
Regal Drug Corporation v. *Wardell*, 260 U. S. 386 8
Rosenberger v. *Pacific Express Co.*, 241 U. S. 28 8
Sarah, The, 8 Wheat. 390 8
State v. *Butler*, 105 Me. 91 8
State Corporation Commission v. *Wichita Gas Co.*, 290 U. S. 561 8
Stewart Dry Goods Co. v. *Lewis*, 294 U. S. 550 8
The J. W. W. French, 13 Fed. 916 8
United States v. *One Ford Sedan*, 297 Fed. 830 8
United States v. *McMurtry*, 48 F. (2d) 258 8
Vance v. *W. A. Vandercook Co.*, 170 U. S. 438 8
Wichita Co. v. *Public Utilities Commission*, 260 U. S. 48 8

STATUTES CITED.

Judicial Code, Section 266 (28 U. S. C. 380) 1, 2
Public Laws of 1935 of the State of Maine, Chapter 109, Section 1 2
2 2
3 3
4 3
5 4
6 4
7 4
8 5
9 6
10 6
11 6

UNITED STATES DISTRICT COURT, DISTRICT OF MAINE, SOUTHERN DIVISION

BOURJOIS, INC.,

Plaintiff-Appellant,

vs.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER AND GEORGE H. COOMBS,

Defendants-Appellees.

STATEMENT PURSUANT TO RULE No. 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

This is an appeal by plaintiff from an order and final decree and judgment, denying an interlocutory judgment in favor of plaintiff to restrain the enforcement of Chapter 109 of the Public Laws of 1935 of the State of Maine, and finally dismissing the complaint. The decision was rendered by a District Court specially constituted under Sec. 266 of the Judicial Code (U. S. Code, Title 28, Sec. 380).

This action was brought against officers of the State of Maine, in order to restrain them from enforcing said Chapter 109, on the ground that it was in violation of the Constitution of the United States of America and the Constitution of the State of Maine.

A motion for interlocutory injunction was made by plaintiff-appellant upon due notice and said motion pressed to

determination before said specially constituted District Court. At the conclusion of the argument on said motion, it was stipulated that said court should render a final decree and judgment, in accordance with its decision on plaintiff's said motion.

All the facts were presented to said specially constituted District Court by depositions and by testimony taken in open court.

The statutory jurisdiction of this court is based on U. S. Code, Title 28, Sec. 380.

The statute in question is found in the Public Laws of 1935 of the State of Maine, p. 295.

Said Statute is as follows:

"An Act for the Regulation of Cosmetics.

SEC. 1. Registration of Cosmetics.—On and after January 1, 1936, no person, firm, corporation or co-partnership shall hold for sale, sell, offer for sale, in intra-state commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare.

SEC. 2. Department of health and welfare authorized to issue certificate of registration. The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50¢ per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50¢.

The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its

judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. Temporary certificates of registration may be issued by said department for any preparation pending investigation of the same.

The department is hereby authorized to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health.

Fees received under the provisions of this act shall be used by said department for carrying out the purposes of this act.

From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the County of Kennebec or any other county in the state from which the same was offered for registration.

SEC. 3. Definition.—'Cosmestic preparations' shall mean tonics, lotions, creams, powders, antiseptics, clays, bleaches, colors, dyes, or other substance used with or without mechanical or electrical apparatus to massage, cleanse, stimulate, manipulate, color, bleach, or otherwise to treat, improve or to beautify, the scalp, face, neck, shoulders, busts, arms, arm pits, hands, or to arrange, dress, curl, wave, cleanse, bleach, color or similarly treat the hair of any person, and shall include all shampoo preparations.

Provided, however, that household and toilet soaps shall not be held to be cosmetic preparations but shall be subject to the provisions of this act if such soaps are represented by the manufacturer or the producer thereof as a preparation for the treatment of disease.

SEC. 4. Permits issued under public laws, 1933, chapter 278.—Permits issued under chapter 278 of the public laws of 1933 shall be considered to be permits issued under this act and shall remain in effect until June 30, 1936 without further payment therefor and may be renewed at the renewal rate provided unless such preparations are prohibited by this act.

SEC. 5. Cosmetic preparations kept or deposited for unlawful sale or use in this state are liable to forfeiture.—Cosmetic preparations kept or deposited within the state intended for unlawful sale or use, and the vessels in which they are contained, are contraband and are subject to forfeiture to the state unless they have been registered with the said department as prescribed in the preceding sections. Sheriffs, deputy sheriffs, police officers, state police officers and duly authorized agents of the said department, shall have the power to seize the same with or without process. In cases where cosmetic preparations are seized without a warrant said preparations shall be kept in some safe place for a reasonable time until a warrant can be procured.

SEC. 6. Duty of officer or duly authorized agent of the said department.—When cosmetic preparations and vessels are seized as provided in the preceding sections the officer or duly authorized agent of the said department, who made such seizure shall immediately file with the magistrate before whom such warrant is returnable, a libel against such preparations and vessels, setting forth this seizure by him describing the cosmetic preparations, their vessels, and the place of seizure, and that they were kept or intended for unlawful sale and use in violation of law and pray for a decree of forfeiture thereof, and such magistrate shall fix a time for the hearing of such libel and shall issue his monition and notice of the same to all persons interested, citing them to appear at the time and place appointed to show cause why said preparations and vessels in which they are contained, should not be declared forfeited, by causing a true and attested copy of said libel and monition to be posted in two public and conspicuous places in the town or place where such preparations were seized, 10 days at least before said libel is returnable.

SEC. 7. Forfeiture is case no claimant appears; proceedings when claimant to be admitted as a party.—If no claimant appears, such magistrate shall, on proof

of notice as aforesaid, declare the same to be forfeited to the state. If any person appears and claims such preparations, or any part thereof, as having a right to the possession thereof at the time when the same were seized, he shall file with the magistrate such claim in writing, stating specifically the right so claimed, the foundation thereof, the items so claimed, the time and place of the seizure and the name of the officer or duly authorized agent of the said department by whom the same were seized, and in it declare that they were not so kept or deposited for unlawful sale and use, as alleged in said libel and monition, and also state his business and place of residence, and shall sign and make oath to the same before said magistrate. If any person so makes claim, he shall be admitted as a party to the process; and the magistrate shall proceed to determine the truth of the allegations in said claim and libel, and may hear any pertinent evidence offered by the libelant or claimant. If the magistrate is, upon hearing, satisfied that said preparations were not so kept or deposited for unlawful sale or use, and that the claimant is entitled to the custody of any part thereof, he shall give him an order in writing, directed to the officer or duly authorized agent of the said department having the same in custody, commanding him to deliver to said claimant the cosmetic preparation to which he is so found to be entitled, within 48 hours after demand. If the magistrate finds the claimant entitled to no part of said preparation he shall render judgment against him for the libelant for costs, to be taxed as in civil cases before such magistrate, and issue execution thereon, and shall declare said preparation forfeited to the state. The claimants may appeal and shall recognize with securities as on appeals in civil causes from a magistrate.

SEC. 8. Constitutionality.—If any section or part thereof, of this act, shall be declared unconstitutional it shall not affect the constitutionality of the remaining parts of this act.

SEC. 9. Exceptions.—Any preparation or preparations purchased prior to the effective date of this act shall not be subject to the provisions of this act, provided that satisfactory evidence is presented that purchase was made prior to the effective date of this act, and further provided that such preparation or preparations are not prohibited by this act because they contain ingredients that are poisonous, injurious or irritating.

SEC. 10. Penalty.—Any person, firm or corporation that violates any provision of the preceding sections, or any ordinance, or by-laws, or regulation made thereunder, shall be punished by a fine of not more than $100.

All fines, forfeitures and costs collected under this act shall be paid to the county as provided by chapter 148 of the revised statutes.

SEC. 11. Repeal.—Chapter 278 of the public laws of 1933 is hereby repealed.

The order and final decree and judgment sought to be reviewed was made and entered on the seventh (7th) day of October, 1936.

The date on which application for appeal was presented was October 15, 1936.

Nature of the Case and Statement of the Grounds Upon Which it is Contended that Substantial Questions are Involved.

Plaintiff is a New York corporation. It has been selling cosmetic preparations for forty years in interstate commerce to retailers and wholesalers located in Maine, and who resold said preparations in intrastate commerce. Plaintiff has also sold its cosmetic preparations in original packages, which were resold to the ultimate consumers. Said original packages were shipped to plaintiff's customers in

Maine, packed in shipping containers, each of which contained a plurality of said original packages.

Plaintiff has never had a place of business in Maine.

Chapter 109 requires that plaintiff register its preparations and pay fees for administering the statute, under penalty of having the sale of its preparations prohibited in intrastate commerce in Maine. The prohibition of such resale of plaintiff's preparations has stopped its business, in interstate commerce, with retailers and wholesalers in Maine.

Plaintiff contends that the State of Maine has no right to exact fees from plaintiff; that a fixed fee per preparation cannot be exacted; that the statute unlawfully commingles the expenses of administering the law relative to cosmetic preparations manufactured in Maine and sold there in interstate commerce, with the expenses of administering the law relative to cosmetic preparations manufactured outside of the State of Maine and sold in interstate commerce to retailers and wholesalers located in Maine; that the law provides for the refusal of an original certificate or the refusal of a renewal of a certificate wholly as the result of ex parte proceedings; that the search and seizure provisions of the statute are contrary to the Constitution of the United States of America and the Constitution of Maine; that the statute is not an inspection statute, because it does not provide for inspection of the merchandise.

The plaintiff pleaded and proved that the amount in controversy exceeded the sum of three thousand dollars, exclusive of interest and costs.

If the statute is constitutional, then any State can raise funds for enforcing a local health law, by exacting a fixed fee per preparation from manufacturers located outside of the State, irrespective of the amount of said preparation sold within the state.

The cases which are believed to show that the questions involved are substantial are as follows:

George H. Lee Co. v. *Webster*, 190 Fed. 353; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438; *Rosenberger* v. *Pacific Express Company*, 241 U. S. 28; *Atlantic Refining Co.* v. *Trumbull*, 43 F. (2d) 154; *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550; *Noel* v. *The People*, 187 Ill. 587; *State* v. *Butler*, 105 Me. 91; *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495; *Wichita Co.* v. *Public Utilities Commission*, 260 U. S. 48; *Cape Elizabeth* v. *Boyd*, 86 Me. 317; *Central Railway Co.* v. *Wright*, 207 U. S. 127; *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386; *Chicago R. R. Co.* v. *State of Minnesota*, 134 U. S. 418; *United States* v. *McMurtry*, 48 F. (2d) 258; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Randall* v. *Patch*, 118 Me. 303; *Dunn* v. *Burleigh*, 62 Me. 24; *Cleveland Refining Co.* v. *Phipps*, 277 Fed. 463, aff. 261 U. S. 449; *Lugo* v. *Suazo*, 59 F. (2d) 386; *The Sarah*, 8 Wheaton 390; *The J. W. French*, 13 Fed. 916; *United States* v. *One Ford Sedan*, 297 Fed. 830.

The cases which are believed to sustain a direct appeal unto this court are as follows:

Jackson v. *Cravens*, 238 Fed. 117; *Pacific Telephone Co.* v. *Kuykendall*, 265 U. S. 196; *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561; *Brucker* v. *Fisher*, 49 F. (2d) 759; *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 230; *Oklahoma Gas & Electric Co.* v. *Oklahoma Co.*, 292 U. S. 386.

Copies of the opinions of the court are appended.

Respectfully submitted,

VERRILL, HALE, BOOTH & IVES,
Solicitors for Plaintiff-Appellant.

HARRY M. VERRILL.
ROBERT HALE.
CHARLES D. BOOTH.

EXHIBIT "A".

Feb. 19, 1936.

In Equity.

BOURJOIS, INC., *Plaintiff*,

v.

CLYDE R. CHAPMAN, GEORGE W. LEADBETTER, GEORGE H. COOMBS, *Defendants*.

Per CURIAM:

This is a bill in equity seeking to enjoin the defendants from enforcing Chap. 109 of the Public Laws of 1935, entitled "An Act for the Registration of Cosmetics," which was heard before a statutory court of three judges under Sec. 380, Title 28, United States Code.

The hearing was on the plaintiff's motion for a temporary injunction on the ground that Sec. 1 of Chap. 109 of the Public Laws of 1935 was limited in its application to the conduct of beauty shops, barber shops, hair dressing establishments or similar establishments, but that the defendants threatened and intended to apply said law by regulating the holding for sale, the sale and the offering for sale in intrastate commerce within the State of Maine the cosmetic preparations by drug stores and department stores and by other stores or establishments which do not come within the scope of Sec. 1 of the Act, and such threat and intended action of the defendants is beyond the authority given to them under the Act.

That Sec. 1 of said Act is in conflict with Sec. VIII of the Constitution of the United States and of the Constitution of the State of Maine in that said section 1 prohibits any person or concern which was conducting a beauty shop, barber shop, hair dressing establishment or any similar establishment within the State of Maine on or after January 1, 1936, from applying the plaintiff's cosmetic preparations in the conduct of said beauty shop, barber shop, hair dressing establishment or other similar establishment,

even if a customer desiring the application of such cosmetic preparations has purchased the same subsequent to January 1, 1936, outside the State of Maine in the original sealed package put out by the plaintiff.

That said statute is contrary to the Constitution of the United States of America in that it attempts to regulate and prohibit the holding for sale, the sale and the offering for sale and the supplying or application within the State of Maine of cosmetic preparations which will be sold and shipped in interstate commerce in the original sealed packages to any of the concerns enumerated in Sec. 1 of the Act within said State.

That said statute is contrary to the Constitution of the United States and of the State of Maine in that it contains an unreasonable delegation of power and deprives the plaintiff of property without due process, inasmuch as it does not provide a hearing at which testimony may be taken, or require, in the event of an appeal from the ruling of the Department of Health and Welfare in case it refuses to issue or renew a certificate of registration, that a record of the proceedings before the Board shall be transmitted to the court so that it may be reviewed by the court; and that the statute does not provide for an effective right of review or appeal.

The provisions of the statute relating to hearings on appeal do not on their face deprive the plaintiff of due process of law, nor are penalties imposed for violation of the statute unreasonable or excessive.

We think the plaintiff has misinterpreted Section 1 of the Act in restricting it to the conduct of beauty shops, barber shops, hair dressing establishments or other similar establishments. The first part of the Act provides that no person, firm, corporation or co-partnership shall hold for sale, sell, offer for sale in intrastate commerce, give away or deal in within this state * * * any cosmetic preparation, unless the said preparation has been registered with and a certificate of registration is secured from the Department of Health and Welfare.

This, we think, is the proper construction of this section and expresses the intention of the legislature in enacting

this section, though a slightly different method of punctuation might have made it clearer.

The plaintiff stresses the interference with interstate commerce. The defendants in their brief insist it is not proposed by the state officials to interfere with interstate commerce; that they will only apply the law when cosmetics have entered into intrastate commerce.

Up to the time of the hearing no rules or regulations had been established by the Department of Health and Welfare, or any plan of putting the statute into operation. We think it is too early to anticipate that the state officials will undertake to interfere with interstate commerce when they insist that they have no such intention, and Sec. 1 of the Act merely prohibits holding for sale, the sale or offering for sale of cosmetic preparations in intrastate commerce.

The only section under which it can be urged that a burden is imposed on interstate commerce is Sec. 2, under which the Department of Health and Welfare is ordered to issue a certificate of registration to any manufacturer, proprietor or producer of cosmetic preparations on the payment of an initial registration fee of fifty cents per preparation, and to renew the same annually on the payment of the same fee.

The exercise of the police powers of the state to protect the inhabitants from injurious substances detrimental to their health is well recognized; Patapsco Guano Co. *v.* North Carolina, 171 U. S. 345, 354; Plumley *v.* Massachusetts, 155 U. S. 461; Savage *v.* Jones, 225 U. S. 501, 525, 527; McLean *v.* Denver & Rio Grande R. R. Co., 203 U. S. 38, 55; Tangera & Co. *v.* New York, 224 N. Y. 269.

Without further evidence of a purpose to interfere with interstate commerce, we think this court is not warranted in issuing a temporary injunction to prohibit action which may never take place so far as the plaintiff is concerned.

Much of the bill of the plaintiff relates to anticipated action on the part of the Department of Health and Welfare of the state, which may never take place, and the above grounds of objection as the basis for the issuing of

a temporary injunction, we think, are not sufficient to warrant the issuing of a temporary injunction at this time.

The fees received under the provisions of this Act are to be used by said Department for carrying out the purposes of the Act, which clearly are for investigation and examination of cosmetic preparations to determine whether they are injurious to the health.

The motion for a temporary injunction is denied, but if it later appears that interstate commerce is unduly interfered with or due process is denied to the plaintiff by any of the provisions of the Act, or regulations adopted thereunder, as enforced by the state officials, the plaintiff's motion for a temporary injunction may be renewed pending final hearing on the bill and answer, when additional evidence may be submitted as to any action of the state officials in enforcing the statute.

EXHIBIT "B".

BOURJOIS, INC.,

v.

CLYDE R. CHAPMAN ET ALS.

Per CURIAM:

The plaintiff, a citizen of the State of New York, brought its bill in equity to enjoin the Attorney General of Maine, and head of the Department of Health and Welfare of the State, and an employe of that department, defendants, the necessary jurisdictional facts being alleged, from enforcing Chapter 109 of the Public Laws of the State of Maine, which provides as follows:

"SEC. 1. Registration of cosmetics.—On and after January 1, 1936, no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, in intra-state commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare.

"SEC. 2. Department of health and welfare authorized to issue certificate of registration.—The said department is hereby authorized to issue and shall issue a certificate of registration to the manufacturer, proprietor, or producer of any cosmetic preparation on the payment of an initial registration fee of 50¢ per preparation, which certificate shall be renewed annually on or before the first day of January in each succeeding year on the payment of a fee of 50¢.

"The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person. Tem-

porary certificates of registration may be issued by said department for any preparation pending investigation of the same.

"The department is hereby authorized to make such regulations as may be necessary for carrying out the purpose of this act to safeguard the public health.

"Fees received under the provisions of this act shall be used by said department for carrying out the purpose of this act.

"From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration."

Sec. 3 defines what is meant by "cosmetic preparations." The remainder of the Act relates to its enforcement.

A hearing was had on a motion of the plaintiff for a temporary injunction on the third day of January, 1936, at which this court construed Sec. 1 of the Act and held that the plaintiff's bill was prematurely brought, since the state officials had taken no steps to enforce the Act, which went into effect on January 1, 1936, and denied any intent to interfere with interstate commerce.

Since that time the state officials have notified local dealers in cosmetics of the Act and their intent to enforce it, and while a large number of out of the state manufacturers of cosmetic preparations have complied with the provisions of Sec. 2, the plaintiff has refused to comply, and the state officials have made seizure in several stores where unregistered cosmetic preparations manufactured by the plaintiff, or by other out of the state manufacturers, were being offered for sale.

The plaintiff now brings its supplemental bill to enjoin the state officials from enforcing the Act so far as the cosmetic preparations manufactured by the plaintiff are concerned, which was answered by the defendant denying any interference with interstate commerce or intent so to do in the future, and contending that the provisions of the Act are a proper exercise of the police powers of the state.

A hearing was held on June 24, 1936, at which time answers to interrogatories by the defendants and additional testimony of witnesses were introduced and briefs have been filed. It was stipulated in open court by the parties that the hearing should be considered a final hearing on the original and supplemental bills and answers thereto and evidence, and that the case should be disposed of by a final decree at this time. It was also agreed that all the evidence introduced at the previous hearing and all pleadings previously filed may be considered by the court in so far as the same are pertinent to the issues presented.

The main points stressed by the plaintiff were that the bill violates Sec. 8 of Art. I, and also the Fourteenth Amendment of the federal Constitution, in that it imposes a burden on interstate commerce and deprives the plaintiff of property rights without due process.

The requirement that no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment within the State of Maine, any cosmetic preparation unless the same shall be registered and a certificate of registration secured from the department of health and welfare, is expressly limited by the Act to intrastate commerce.

The plaintiff, however, contends that the requirement that every out of the state manufacturer or producer of cosmetic preparations who sells cosmetic preparations to retailers for sale in the State of Maine, shall register each preparation and pay an initial registration fee of 50¢ per preparation, is a burden on interstate commerce; that the plaintiff ships its products into the State in "original packages;" hence the requirement that each "preparation" shall be registered and a fee of 50¢ per preparation paid is a burden on interstate commerce; and that each separate package of cosmetics remains in interstate commerce until sold by the retailer.

Packages seized in local stores were introduced in evidence as exhibits, containing lip sticks, face powder, toilet creams, and other cosmetic preparations, all in separate and small packages, some of which were approximately 1½"

x ¾" x ½" in size, and which it was testified were shipped by the manufacturer from out of the state to the retailer in Maine in a shipping container or carton, from which they are removed by the retailer and placed on the shelves and counters of the local trade for sale, or are kept in their storerooms until needed in their retail department; the only exception being where some individual may have ordered a cosmetic preparation not carried by the retailer and a single package containing the article is shipped direct to the consumer, or to the retailer and delivered in the original container to the purchaser.

It is clear, we think, that the "original package" is the shipping container in which the cosmetic preparations are shipped into the state, and when they are removed therefrom and placed on the shelves or counters, or in the storerooms of the retailer they have become mingled with the mass of property in the state and are no longer in interstate commerce, and if unregistered in accordance with Sec. 2 of the Act, are subject to seizure and forfeiture.

This is amply borne out by the decisions. The law relating to original packages was first considered in Brown *v.* Maryland, 12 Wheat. 419, in which the State of Maryland required all importers of intoxicating liquors by wholesale hogshead, barrel or tierce to take out a license which the Supreme Court held was repugnant to that provision of the Constitution forbidding a levying of a duty on imports as well as that declaring that Congress should have the power to regulate commerce with foreign nations.

The following *dictum* in the opinion in that case by Chief Justice Marshall: "We suppose the principle laid down in this case to apply equally to importations from a sister state," was subsequently considered in Woodruff *v.* Parham, 8 Wall. 123, and the decision was held to have no application to commerce between the states and only applied to articles imported from a foreign country into the United States.

The principle laid down in Woodruff *v.* Parham was applied in Brown *v.* Huston, 114 U. S. 622, and in Pittsburgh & Southern Coal Co. *v.* Bates, 156 U. S. 577.

But in May *v.* New Orleans, 178 U. S. 496, which involved the validity of tax assessments on goods imported from a foreign country, the goods were shipped in large cases for importation, but were put up in smaller packages, a large number being enclosed in each box. On arrival the packages were taken out and sold unbroken. The Court said:

> "In our judgment the original package * * * was the box or case in which the goods imported were shipped, and when the box was opened for sale or delivery of the separate parcels contained in it, each parcel lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

The principles laid down in Austin *v.* Tennessee, 179 U. S. 343, are decisive of the case here. The Court said, page 359:

> "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original package' in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into

the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article."

Again, the Court said on page 360 of the above case:

"This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities."

While the court's conclusion in this case was grounded on the opportunity for fraud upon the health laws of a state, the opportunity is just as great in connection with cosmetic preparations, if the contention of the plaintiff is sustained in this case.

The principles laid down in Austin *v.* Tennessee were adhered to in Cook *v.* Marshall County, 196 U. S. 261, 269, 270, and cited with approval in Kirmeyer *v.* State of Kansas, 236 U. S. 568, 573; McDermott *v.* State of Wisconsin, 228 U. S. 116, 135; Hebe Co. *v.* Shaw, 248 U. S. 297, 304.

In Cleveland Macaroni Co. *v.* State Board of Health, 256 Fed. 376, in which the plaintiff's contention was the same as that of the plaintiff here, viz: that the goods put up in separate packages were shipped in large shipping cases and taken out by the retailer and sold in the original packages in which they were put up, or the retailer removed them

from the cases in which they were shipped and placed them on the shelves for sale to the consumer, the Court said:

> "Ordinarily such disposition withdraws goods shipped into a state from the domain of interstate commerce, and makes them a part of the general body of local commerce, and subjects them to any reasonable regulations by the State," citing Austin *v.* Tennessee, *supra.* The Court further said:
>
> "It appears from the defendant's return on the order to show cause that the plaintiff's goods were shipped into the state in large containers or boxes, each containing a certain number of small packages or paper cartons, in quantities suitable for sale to the consumer, and that it is in this latter form they are sold by retailers."

In McDermott *v.* State of Wisconsin, *supra,* the Court said:

> "And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted," citing the cases of Austin *v.* Tennessee, and Cook *v.* Marshall County, *supra.*

Some of the state cases in which the doctrine of the above cases have been applied are: Commonwealth *v.* Schollenberger, 156 Penn. St. 201; Haley *v.* Nebraska, 42 Nebr. 556; McGregor *v.* Cone, 104 Iowa, 465, 471, 473; State *v.* Winters, 44 Kan. Sup. 723.

In Commonwealth *v.* Schollenberger, *supra,* the Court, in defining an original package, said:

> It is "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce."

The exhibits introduced in evidence cannot be said to comply with this definition. Also see United States *v.* One Hundred and Thirty-two Packages, 76 Fed. 364, 368; Vol. 2, Bouvier's Law Dictionary under Title, "Original Packages."

Under the rule laid down in the above cases we think interstate commerce ends under the facts shown by the evidence in this case, as soon as the separate packages in which the cosmetic preparations of the plaintiff were put up for sale to the consumer have been taken from the shipping container in which they were shipped into Maine, and placed on the shelves or counters, or in the storerooms of the retailers, and they are then subject to state laws.

The other principal issue in the case is whether Chap. 109 of the Public Laws of 1935 by its requirement of registration by the manufacturer of all cosmetic preparations sold or offered for sale in this state is a violation of the Fourteenth Amendment to the Federal Constitution, or a valid exercise of the police powers of the State for the purpose of safeguarding the public health of its citizens.

A manufacturer is not obliged to ship goods into the State for sale here, but if such goods are shipped into Maine for the purpose of resale by local dealers, they must be registered or they are subject to forfeiture.

It is urged, however, that it is a mere registration law and is not within the police powers of the State, but imposes an undue burden on interstate commerce. Distinctions have been drawn between laws merely requiring the registration of products manufactured in one state and sold in a sister state, but which require no inspection, or where a sample of the article shipped into the State is required to be furnished by the shipper. Savage *v.* Jones, 225 U. S. 501; George H. Lee & Co. *v.* Webster, 190 Fed. 353. These cases, however, do not apply *in toto* to the statute under consideration. While the Act could have been drawn so that the intent of the legislature was more clearly defined, we think it obviously implies something more than mere registration of all cosmetic preparations by the manufacturer or producer, if intended for sale in this State by a retailer or jobber.

The intent of the legislature that something more than mere registration of cosmetic preparations is required is clearly indicated in Sec. 2 of the Act, whereby the Department of Health and Welfare "is authorized to refuse a certificate of registration, or to prohibit the sale of cosmetic preparations *which in its judgment* contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person;" and "Temporary certificates of registration may be issued by said department for any preparation *pending investigation of the same.*"

There can be no question that the purpose of the Act was to safeguard the public health, since the Health Department under Sec. 2 "is authorized to make such regulations as may be necessary for carrying out *the purpose of this Act to safeguard the public health.*"

That there must be proceedings by the Department of Health to determine whether any cosmetic preparations may be detrimental to the health of the users is self-evident. The manufacturer is not required to furnish samples of its preparations with a formula containing its ingredients; the Department of Health and Welfare perforce must go to places where cosmetic preparations are on sale in this State and purchase packages and analyze their contents to determine whether they contain any substance or substances in such amounts as to be injurious to the health of the person using such preparations. Evidence introduced before the court disclosed that certain cosmetic preparations have proven injurious to the users of the same.

It is well settled that in the exercise of its police powers a state may take such action, either by requiring proper labels, or by inspection, or by such proceedings as may be necessary to determine whether articles of food, fertilizers, any article advertised as of medicinal value, or any article to be applied to the face or body of the user for beautifying or medicinal purposes are injurious to the public health, even if incidentally interstate commerce may be affected. Savage *v.* Jones, *supra,* p. 525; Plumley *v.* Massachusetts, 155 U. S. 461; McDermott *v.* State of Wisconsin, *supra,* p. 131; Patapsco Guano Co. *v.* North Caro-

lina Board of Agriculture, 171 U. S. 345; Standard Stock Food Co. *v.* Wright, 225 U. S. 540, 549; Powell *v.* Pennsylvania, 127 U. S. 678, 683.

In Austin *v.* Tennessee, *supra*, p. 349, the Court laid down the rule that:

> "We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

And again on page 362:

> "The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserved power of the State to protect the health of its people, by reasonable regulation, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the State, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one State from another State, then the action of a State by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of

> power to regulate commerce should override the power reserved by the States to pass laws that had substantial relations to the health of their people."

In the case of Powell *v.* Pennsylvania, *supra*, the court said, p. 683:

> "It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment (14th); for it is the settled doctrine of this Court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. Mugler *v.* Kansas, 123 U. S. 663; Barbier *v.* Connolly, 113 U. S. 27."

It is urged that the fees collected of the registrants are not exclusively used for the inspection of cosmetic preparations and for carrying out the purpose of the Act; but the evidence fails to sustain any allegations of the plaintiff's bill and supplemental bills to this effect. This Court cannot assume such to be the fact, and so far as any evidence appears in the case it is to the contrary. The legislature in its wisdom has fixed this fee as necessary to cover the cost of inspection and enforcing the act. Without evidence clearly showing it to be excessive, this Court cannot declare this provision of the statute to be in violation of either the State or the Federal constitution.

Every presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. Sinking Fund Cases, 99 U. S. 700, 718.

The bills are dismissed with one bill of costs.